

1986

# The Eighth Amendment and Capital Punishment of Juveniles

Victor L. Streib

*Cleveland-Marshall College of Law*

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

 Part of the [Criminal Law Commons](#), and the [Juvenile Law Commons](#)

**How does access to this work benefit you? Let us know!**

---

## Recommended Citation

Victor L. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Clev. St. L. Rev. 363 (1985-1986)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

# THE EIGHTH AMENDMENT AND CAPITAL PUNISHMENT OF JUVENILES

VICTOR L. STREIB\*

I.	CURRENT LAW AND PRACTICE . . . . .	365
	<i>A. United States Supreme Court Rulings . . . . .</i>	365
	<i>B. Specific Statutory Provisions . . . . .</i>	368
	<i>C. Lower Court Cases . . . . .</i>	371
	<i>D. Past Executions and Present Sentences . . . . .</i>	376
II.	UNIQUE CONSTITUTIONAL RIGHTS FOR JUVENILES . . . . .	377
III.	EXCESSIVE AND DISPROPORTIONATE . . . . .	378
	<i>A. History and Precedent . . . . .</i>	379
	<i>B. Legislative Attitudes . . . . .</i>	381
	<i>C. Jury Sentencing Patterns . . . . .</i>	383
	<i>D. Contemporary Standards of Decency . . . . .</i>	388
IV.	MEASUREABLE CONTRIBUTION TO GOALS OF PUNISHMENT . . . . .	390
	<i>A. Retribution . . . . .</i>	391
	<i>B. General Deterrence . . . . .</i>	392
	<i>C. Specific Deterrence and Incapacitation . . . . .</i>	394
	<i>D. Reformation, Rehabilitation, and Treatment . . . . .</i>	395
V.	ARBITRARY, CAPRICIOUS, AND FREAKISH MANNER . . . . .	395
VI.	AGE EIGHTEEN IS MOST APPROPRIATE . . . . .	397
VII.	SUMMARY AND CONCLUSIONS . . . . .	398

The practice of imposing the death penalty for crimes committed while under the age of eighteen has occurred sporadically but persistently throughout American history. It gives every indication of continuing in this mode under current law and practice, having been manifested most recently with the execution of Jay Kelly Pinkerton on May 15, 1986.<sup>1</sup>

---

\* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. The author wishes to express his great appreciation for the most helpful comments and suggestions by Mr. Randall F. Kender, an outstanding law student at Cleveland-Marshall College of Law at the time this article was being written.

<sup>1</sup> Current research indicates that a total of 281 such juveniles have been executed in American history from 1642 through 1986. This research was first published as Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983), which reported 287 documented cases. Subsequent research has reduced that number to 281 documented cases. See Streib, *Persons Executed for Crimes Committed While Under Age Eighteen* (July 1986)(unpublished research paper, available from author).

Greatly differing approaches are followed by the various states as to the authorization and imposition of capital punishment for juveniles.<sup>2</sup> This article explores the existence of a constitutionally-mandated minimum age below which the states may not venture in carrying out this practice.<sup>3</sup> If such a nationwide minimum age exists or should exist, its justification can be found in current interpretations of the eighth amendment to the United States Constitution.

As the next section of this article documents, the practice of capital punishment of juveniles has been rare but not so rare that it can be ignored. The remainder of this article considers, point by point, the factors deemed important by the United States Supreme Court in determining whether capital punishment is prohibited by the eighth amendment. A fundamental theme is the mistake of uncritically transferring constitutionality conclusions from adult capital offender cases to juvenile capital offender cases. Justice Frankfurter's observation pervades this analysis: "Children [have] a very special place in life which the law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children."<sup>4</sup> On the precise issue of juvenile crime, it is "unrealistic to treat young offenders as if they have fully mature judgment and control."<sup>5</sup> Thus, when examining the law and

---

The first documented case was that of Thomas Graunger, age sixteen, executed in 1642 in Plymouth Colony, Massachusetts, for bestiality. N. TEETERS & J. HEDBLOM, "... HANG BY THE NECK ..." 111 (1967). Prior to the current era of the death penalty (1977 - present), the last juvenile execution was that of James Echols in Texas on May 7, 1964, for a rape committed when he was only seventeen. *Echols v. State*, 370 S.W.2d 892 (Tex. Crim. App. 1963)(affirming conviction and death sentence); W. BOWERS, *LEGAL HOMICIDE* 512 (1984)(reporting execution).

After a twenty-one year hiatus in juvenile executions, Texas executed Charles Rumbaugh on September 11, 1985, for a robbery and murder committed when he was only seventeen. *N.Y. Times*, Sept. 12, 1985, at 11, col. 4. James Terry Roach was executed by South Carolina on January 10, 1986. *N.Y. Times*, Jan. 11, 1986, at 7, col. 1. The last juvenile execution as of this writing was of Jay Kelly Pinkerton in Texas on May 15, 1986. *N.Y. Times*, May 16, 1986, at 11, col. 1.

<sup>2</sup> The term "juveniles" is used to denote that category of offenders who committed their capital crimes while under the age of eighteen. The term bears this meaning throughout this article for the sake of brevity and continuity.

<sup>3</sup> The argument for this concept was made first and most eloquently by Jay Baker, attorney for Monty Lee Eddings, in his now-classic Brief for Petitioner at 18-59, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). His brief has been the basis for many subsequent briefs and articles. A well-done and persuasive piece arguing the opposite position of this article is Hill, *Can the Death Penalty be Imposed on Juveniles: The Unanswered Question* in *Eddings v. Oklahoma*, 20 CRIM. L. BULL. 5 (1984). Among the several student pieces, the most complete exposition of these issues appears in Note, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY 1471 (1983).

<sup>4</sup> *May v. Anderson*, 345 U.S. 528, 536 (1953)(Frankfurter, J., concurring).

<sup>5</sup> TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* 7 (1978).

practice of capital punishment, juveniles traditionally have not been, and should not be, treated the same as adults for this or any other legal purpose.

## I. CURRENT LAW AND PRACTICE

Although the issue of the constitutionality of capital punishment for juveniles has never been decided directly by the United States Supreme Court,<sup>6</sup> various facets of the legality of this practice have been considered by that Court as well as many other courts and legislatures. Before turning to the precise constitutional issues involved, this general legal context should be understood. The other essential background context is the actual practice of capital punishment of juveniles, provided later in this section.

### A. *United States Supreme Court Rulings*

The Court's attention to the capital punishment issue during the past fifteen years is well-known and widely reported, although the constitutionality of capital punishment had never been seriously questioned by the Court prior to this period.<sup>7</sup> Beginning in 1972, the Court produced several landmark opinions which completely reinterpreted and restated this area of law.

*Furman v. Georgia*<sup>8</sup> was the first of these cases. *Furman*, with its ten separate opinions and 232 total pages, overwhelmed most observers, but left many of the critical issues in capital punishment unresolved. The Court held that the death penalty was unconstitutional as applied in the particular cases then before it, but failed to decide whether such punishment was unconstitutional for all crimes and under all circumstances.<sup>9</sup>

The Court's holding in *Gregg v. Georgia*<sup>10</sup> launched the current era. In *Gregg*, a majority of the Court held that the death penalty does not violate *per se* the eighth amendment.<sup>11</sup> While the issue was not specifically before the Court in *Gregg*, the concern for the age of the offender emerged even in this case. The Court approved the Georgia statute's guided discretion for the jury's consideration of aggravating and mitigat-

---

<sup>6</sup> The Court, over the strong dissent of Justice Brennan, again refused to address this issue when it denied certiorari in *Roach v. Aiken*, 106 S. Ct. 645 (1986). See also *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

<sup>7</sup> *Furman v. Georgia*, 408 U.S. 238, 407-08 (Blackmun, J., dissenting); *id.* at 428 (Powell, J., dissenting).

<sup>8</sup> 408 U.S. 238 (1972).

<sup>9</sup> *Id.*

<sup>10</sup> 428 U.S. 153 (1976).

<sup>11</sup> *Id.* at 169 (Stewart, J., plurality opinion), *id.* at 226 (White, J., concurring).

ing factors in the sentencing hearing.<sup>12</sup> In passing, the Court approved the requirement that the jury consider the offender's characteristics, including such hypothetical questions as the following: "Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, . . . )?"<sup>13</sup> In a companion case to *Gregg*, the Court approved a Texas statute which provided that the sentencing jury "could further look to the age of the defendant"<sup>14</sup> in deciding between life imprisonment and the death sentence.

In subsequent cases, the Court continued to favor guided discretion statutes, such as those approved in *Gregg*, and to reject the mandatory death penalty statutes. In *Roberts v. Louisiana*,<sup>15</sup> the Court found unconstitutional a statute which dictated mandatory capital punishment for the killing of a police officer. Stressing the need to consider mitigating circumstances in all capital punishment cases, the Court once again expressly mentioned the youth of the offender as an appropriate mitigating factor and noted its relevance in many jurisdictions.<sup>16</sup>

In 1978, the Supreme Court decided two cases from Ohio which made clear the requirement that sentencing juries and judges consider all mitigating factors proffered by the defendant, including the youth of the offender. The lead decision of *Lockett v. Ohio*<sup>17</sup> held that such unlimited consideration of mitigating factors was constitutionally required, in part because without such a requirement under the Ohio statute, "consideration of defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision."<sup>18</sup>

The companion case to *Lockett* was *Bell v. Ohio*,<sup>19</sup> in which the appellant was only sixteen years old at the time of the murder for which he was subsequently convicted and sentenced to death.<sup>20</sup> At the sentencing hearing, Bell's attorney had argued that Bell's youth should be considered as a mitigating factor; however, the Ohio statute prohibited introduction of any mitigating factors beyond those few expressly permitted. The Supreme Court reversed Bell's death sentence, relying upon the reasoning and requirements expressed in *Lockett*.<sup>21</sup> The Court did not address Bell's contention that the death penalty was disproportionate as

---

<sup>12</sup> *Id.* at 196-98 (Stewart, J., plurality opinion).

<sup>13</sup> *Id.* at 197.

<sup>14</sup> *Jurek v. Texas*, 428 U.S. 262, 273 (Stewart, J., plurality opinion)(quoting with approval *Jurek v. Texas*, 522 S.W.2d 934, 940 (Tex. Crim. App. 1975)).

<sup>15</sup> 431 U.S. 633 (1977).

<sup>16</sup> *Id.* at 637.

<sup>17</sup> 438 U.S. 586 (1978).

<sup>18</sup> *Id.* at 608.

<sup>19</sup> 438 U.S. 637 (1978).

<sup>20</sup> *Id.* at 639.

<sup>21</sup> *Id.* at 642-43.

applied in his case (an argument that presumably would have stressed Bell's youthful age) since the case had already been resolved under the *Lockett* reasoning.<sup>22</sup>

A few years later, the Supreme Court agreed to hear the specific issue of the constitutionality of capital punishment for an offense committed when the defendant was only sixteen years old.<sup>23</sup> In its final holding, however, the *Eddings* Court avoided that constitutionality issue and sent the case back for resentencing after full consideration of all mitigating factors per the *Lockett* holding.<sup>24</sup> On the issue of the offender's youth, the Court observed:

The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.<sup>25</sup>

In the five-to-four *Eddings* decision, the majority avoided deciding the constitutionality issue;<sup>26</sup> in contrast and rebuke, Chief Justice Burger dissented and found no constitutional bar to the death penalty for this sixteen-year-old's crime.<sup>27</sup> Chief Justice Burger's dissent was joined by Justices Blackmun, Rehnquist, and White. Therefore, at least four members of the Court would have decided the issue at that time, to the detriment of young Monty Lee Eddings.

Since *Eddings*, the Supreme Court has been asked repeatedly to consider the constitutionality issue; thus far, those requests have been regularly rejected.<sup>28</sup> The determination of the legality of capital punishment for juveniles is thus left to individual jurisdictions. The only constitutional mandate is that each jurisdiction must permit the sentencing jury and/or judge to consider the youth of the offender as a mitigating factor. This article now considers struggles of the various jurisdictions and some of their decisions concerning this troublesome issue.

<sup>22</sup> *Id.* at 642-43 n.\*.

<sup>23</sup> *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

<sup>24</sup> *Eddings*, 455 U.S. at 117.

<sup>25</sup> *Id.* at 115-16 (footnotes omitted).

<sup>26</sup> *See id.* at 119 (O'Connor, J., concurring).

<sup>27</sup> *Id.* at 128 (Burger, C.J., dissenting).

<sup>28</sup> *See, e.g.,* *Roach v. Martin*, 757 F.2d 1463 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 645 (1986); *Trimble v. State*, 300 Md. 387, 478 A.2d 1143 (1984), *cert. denied*, 105 S. Ct. 1231 (1985); *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985); *High v. Zant*, 250 Ga. 693, 300 S.E.2d 654 (1983), *cert. denied*, 104 S. Ct. 2669 (1984); *Tokman v. State*, 435 So. 2d 664 (Miss. 1983), *cert. denied*, 104 S. Ct. 3574 (1984).

### B. Specific Statutory Provisions

The federal capital punishment statute has been under a considerable cloud since *Furman* and *Gregg* were decided because many of its provisions conflict with the principles established in those cases.<sup>29</sup> A new federal bill which would establish an apparently valid federal capital punishment statute requiring a minimum age of eighteen at the time of the crime is now pending before the Senate, but has been stalled in previous years in the United States House of Representatives.<sup>30</sup> Although President Reagan expressed his support of a new federal capital punishment law in his state of the union address on February 6, 1985,<sup>31</sup> the bill has not yet passed; and no new comprehensive federal death penalty statute seems likely to be adopted in the near future.

Within the fifty states and the District of Columbia, the statutory law seems fairly well settled. Fifteen of these fifty-one jurisdictions have no capital punishment statutes and none in the offing.<sup>32</sup> These fifteen jurisdictions do not execute anyone, including juveniles. Fourteen other states have capital punishment statutes which expressly prohibit such punishment for juveniles.<sup>33</sup> Ten states set the minimum age at eighteen.<sup>34</sup> Three

<sup>29</sup> Current federal statutes authorize the death penalty for a variety of crimes. See, e.g., 18 U.S.C.A. § 1111 (West 1969)(murder); 18 U.S.C.A. § 2031 (West 1969)(rape); 18 U.S.C.A. § 2113 (West 1969)(bank robbery). However, they do not provide for the guided discretion in sentencing required by the Supreme Court in *Gregg* and thus are clearly unconstitutional. No persons are presently under a sentence of death for violation of federal laws.

<sup>30</sup> S. REP. NO. 239, 99th Cong., 2d Sess. 3591 (1986). An amendment placed in the original bill states "that no person may be sentenced to death who was less than eighteen years of age at the time of the offense." *Id.* This bill as amended was ordered out of the Senate Judiciary Committee on February 20, 1986, and placed on the Senate's legislative calendar on April 16, 1986. I CONG. INDEX 20,501 (1985-86).

<sup>31</sup> See N.Y. Times, Feb. 7, 1985, at 13, col. 4.

<sup>32</sup> Alaska (none since 1957); District of Columbia (none since 1973); Hawaii (none since 1957); Iowa (none since 1965); Kansas (none since 1973); Maine (none since 1887); Massachusetts (none since 1984); Michigan (none since 1963); Minnesota (none since 1911); New York (none since 1985); North Dakota (none since 1957); Rhode Island (none since 1979); Vermont (pre-*Furman* statute still in the code but clearly invalid); West Virginia (none since 1965); Wisconsin (none since 1853).

<sup>33</sup> California (CAL. PENAL CODE § 190.5 (West Supp. 1986)); Colorado (COLO. REV. STAT. § 16-11-103 (Supp. 1985)); Connecticut (CONN. GEN. STAT. ANN. § 53a-46a(g)(1)(West 1985)); Georgia (GA. CODE ANN. § 17-9-3 (1982)); Illinois (ILL. ANN. STAT. ch. 38, § 9-1(b)(Smith-Hurd Supp. 1985)); Nebraska (NEB. REV. STAT. § 28-105.01 (1982)); Nevada (NEV. REV. STAT. § 176.025 (1979)); New Hampshire (N.H. REV. STAT. ANN. § 630:5 (II)(b)(5)(Supp. 1983)); New Jersey (N.J. STAT. ANN. § 2C:11-3f (West 1986)(P.L. 1985, ch. 4780 approved Jan. 17, 1986)); New Mexico (N.M. STAT. ANN. § 31-18-14A (1979)); Ohio (OHIO REV. CODE ANN. § 2929.03(E)(Page 1982)); Oregon (OR. REV. STAT. § 161 (1985)); Tennessee (TENN. CODE ANN. § 37-1-134(1)(1984)); Texas (TEX. PENAL CODE ANN. § 8.07(d)(Vernon Supp. 1985)).

<sup>34</sup> California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio, Oregon and Tennessee. *Id.*

use age seventeen as the minimum<sup>35</sup> and Nevada uses age sixteen as the minimum.<sup>36</sup>

In addition to the fourteen states which set a minimum age in their capital punishment statutes, thirteen other states establish a minimum age limit through other statutory means. One way is to give exclusive original jurisdiction over juvenile crime to their juvenile courts and then to establish a minimum age for waiver of juvenile court jurisdiction and transfer to adult criminal court. Only if a juvenile meets or exceeds this minimum age can s/he be prosecuted for a capital crime in criminal court and thus be in jeopardy of receiving capital punishment. Eight states follow this manner of establishing a minimum age for capital punishment.<sup>37</sup> Four of these states<sup>38</sup> use age fourteen. Virginia uses age fifteen, Mississippi age thirteen, Montana age twelve, and Indiana age ten.<sup>39</sup>

The other statutory method for establishing a minimum age for capital punishment is to give concurrent or exclusive original jurisdiction to an adult criminal court if the crime is capital murder and the defendant is of a certain age or older. Five states follow this procedure.<sup>40</sup> Arkansas, Idaho, North Carolina, and Pennsylvania use age fourteen while Louisiana uses age fifteen.<sup>41</sup>

Another group of six states has no minimum age limits in either capital punishment statutes or the juvenile court statutes but specifically and expressly list the age of the offender as a mitigating factor in capital punishment statutes.<sup>42</sup> These six states must allow evidence proffered by the defendant on any mitigating circumstance, including youthfulness of

<sup>35</sup> Georgia, New Hampshire and Texas. *See supra* note 33.

<sup>36</sup> *See supra* note 33. This list was comprised of fifteen states including Kentucky. Kentucky repealed its new juvenile code in 1984 due to funding problems. That code, passed originally in 1980, prohibited capital punishment for juveniles under age eighteen. KY. REV. STAT. § 208F.040 (1980)(repealed 1984).

<sup>37</sup> Alabama (ALA. CODE § 12-15-34(a)(1977)); Indiana (IND. CODE ANN. § 31-6-2-4(c)(Burns Supp. 1982)); Kentucky (KY. REV. STAT. ANN. § 208E.070(2)(Baldwin 1980)); Mississippi (MISS. CODE ANN. § 43-21-151 (1985)); Missouri (MO. ANN. STAT. § 211.071 (Vernon Supp. 1985)); Montana (MONT. CODE ANN. § 31-5-206 (1985)); Utah (UTAH CODE ANN. § 78-3a-25 (1)(Supp. 1983)); and Virginia (VA. CODE ANN. § 16.1-269(A)(1982)).

<sup>38</sup> Alabama, Kentucky, Missouri and Utah. *Id.*

<sup>39</sup> *See supra* note 7.

<sup>40</sup> Arkansas (ARK. STAT. ANN. § 41-61712)(Supp. 1985)); Idaho (IDAHO CODE § 16-1806A-1 (Supp. 1984)); Louisiana (LA. REV. STAT. ANN. § 13:1570(A)(5)(West 1983)); North Carolina (N.C. GEN. STAT. § 7A-608 (1981)); Pennsylvania (PA. CODE STAT. § 6355(a)(1)(1982)).

<sup>41</sup> *Id.*

<sup>42</sup> Arizona (ARIZ. REV. STAT. ANN. § 13-703(G)(5)(Supp. 1985)); Florida (FLA. STAT. ANN. § 921.141(6)(g)(West Supp. 1984)); Maryland (MD. CODE ANN. art. 27, § 413(g)(5)(Supp. 1985)); South Carolina (S.C. CODE ANN. § 16-3-20(c)(b)(7)(1985)); Washington (WASH. REV. CODE § 10.95.070(7)(Supp. 1986)); Wyoming (WYO. STAT. § 6-2-102(j)(vii) 1977 Repub. ed., (Repl. 1983)).



the offender.<sup>43</sup> Additionally, they have statutorily specified age of the offender as one of those mitigating factors to be considered.

The remaining three jurisdictions have valid capital punishment statutes and permit mitigating factors to be considered; however, they have not listed expressly and specifically the age of the offender as a mitigating factor in their statutes.<sup>44</sup> In these states the defendant may offer his or her youthfulness as a mitigating factor, but this specific factor is not mentioned in the capital punishment statute and no minimum age is set forth in any other statute.

Table 1 arrays the thirty-six capital punishment states according to their establishment, by whatever means, of a minimum age of the offender at the time of the offense for eligibility for capital punishment. No minimum age whatsoever is established in nine of these capital punishment states.

TABLE 1  
MINIMUM AGE OF OFFENDER REQUIRED BY  
THIRTY-SIX CAPITAL PUNISHMENT JURISDICTIONS

<u>Age at Offense</u>	<u>Jurisdiction</u>	<u>Total</u>
10:	Indiana	1
12:	Montana	1
13:	Mississippi	1
14:	Alabama, Arkansas, Idaho, Kentucky, Missouri, New Jersey, North Carolina, Pennsylvania and Utah	8
15:	Louisiana and Virginia	2
16:	Nevada	1
17:	Georgia, New Hampshire and Texas	3
18:	California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio, Oregon and Tennessee	10
No Minimum:	Arizona, Delaware, Florida, Maryland, Oklahoma, South Carolina, South Dakota, Washington and Wyoming	9
		--
	Total:	36

<sup>43</sup> *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 536 (1978).

<sup>44</sup> Delaware (DEL. CODE ANN. tit. 11, § 4209(c)(1974 Rev. ed., Repl. 1979)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 701.01 (West 1983)); South Dakota (S.D. CODIFIED LAWS ANN. 23A-27A-1 (Supp. 1984)).

Of the twenty-seven states which establish a minimum age, ten use age eighteen directly in their capital punishment statutes. Eight states have established age fourteen as the minimum resulting from their juvenile court waiver statutes and/or through their exclusive or concurrent jurisdiction provisions. While this practice operates to establish a minimum age for capital punishment, it more precisely sets a minimum age for criminal court jurisdiction in general. Apparently, no specific consideration was given to the narrower issue of a minimum age for capital punishment. The rest of the twenty-seven states' statutes contain minimum ages scattered throughout the ages of ten, twelve, thirteen, fifteen, sixteen, and seventeen. Of course, all states which have capital punishment statutes must allow youthfulness of the offender as a mitigating factor.<sup>45</sup>

### C. Lower Court Cases

Case law in these fifty-one jurisdictions has developed in a fairly inconsistent fashion. Prior to the Supreme Court's decision in *Eddings*, several state supreme courts addressed the issue of severe criminal punishments for juveniles. A case often cited is *Workman v. Commonwealth*<sup>46</sup> in which a fourteen-year-old boy was sentenced to life in prison, without possibility for parole, for the crime of rape. The Kentucky Supreme Court found such severe criminal punishment to be cruel and unusual under the Kentucky Constitution when applied to a juvenile.<sup>47</sup>

Other state cases have dealt directly with capital punishment for juveniles. *State v. Stewart*<sup>48</sup> was a Nebraska case decided under the then-new Nebraska statute which provided for age of the offender as only one of several mitigating factors to be considered. The court interpreted the statutory provision as applicable to a sixteen-year-old offender and, in combination with the absence of any significant criminal record, to "mitigate strongly against the imposition of the death penalty."<sup>49</sup> The Nebraska Supreme Court reduced the juvenile's sentence from death to life imprisonment.

*Lewis v. State*<sup>50</sup> also dealt with a sixteen-year-old offender sentenced to death for murdering a police officer in the course of a robbery. This case arose prior to the current amendment to the Georgia statute which prohibits capital punishment for crimes committed while under age seventeen.<sup>51</sup> The case was reversed on a juror-selection issue but is of

<sup>45</sup> *Eddings*, 455 U.S. 104 (1982); *Lockett*, 438 U.S. 536 (1978).

<sup>46</sup> 429 S.W.2d 374 (Ky. 1968).

<sup>47</sup> *Id.* at 378.

<sup>48</sup> 197 Neb. 497, 250 N.W.2d 849 (1977).

<sup>49</sup> *Id.* at 526, 250 N.W.2d at 866.

<sup>50</sup> 246 Ga. 101, 268 S.E.2d 915 (1980).

<sup>51</sup> GA. CODE ANN. § 17-9-3 (1982).

importance to this analysis for the comments found in a concurring opinion. Noting that only one sixteen-year-old had been sentenced to death under Georgia's 1973 statute (the case had been reversed for jury instruction errors), the concurring justice opined "that the death penalty has been so rarely imposed upon persons under 17 as to make the death sentence in this case excessive and disproportionate and hence unconstitutional."<sup>52</sup> Soon thereafter, the Georgia legislature amended the Georgia capital punishment statute to put the minimum age at seventeen.

The final pre-*Eddings* case worthy of mention is *People v. Davis*.<sup>53</sup> Like *Workman*, the *Davis* case concluded that life imprisonment without possibility of parole should not be imposed for crimes committed while under the age of eighteen. The California court in *Davis* read that exclusion for juveniles into a fairly vague state and opted, as did the Kentucky court in *Workman*, to prohibit such a harsh criminal sanction for juveniles. These four pre-*Eddings* cases are only selected examples of the many cases decided along similar lines.<sup>54</sup>

*Eddings v. Oklahoma*<sup>55</sup> was decided by the United States Supreme Court on January 19, 1982, and subsequently has been relied upon by many lower courts. As was discussed earlier, the Court in *Eddings* reaffirmed that youth of the offender is a mitigating factor of great weight which must be considered although the Court avoided any direct holding on the constitutionality of capital punishment of juveniles.<sup>56</sup> However, several lower courts have devined more from the *Eddings* holding than seems reasonable.

Cases such as *High v. Zant*<sup>57</sup> and *State v. Battle*<sup>58</sup> have cited *Eddings* as holding that capital punishment for juveniles is not *per se* cruel and

<sup>52</sup> *Lewis*, 246 Ga. at 107, 268 S.E.2d at 921 (Hill, J., concurring).

<sup>53</sup> 29 Cal. 3d 814, 633 P.2d 186, 176 Cal. Rptr. 521 (1981).

<sup>54</sup> See, e.g., *Bracewell v. State*, 401 So. 2d 124 (Ala. Crim. App. 1980)("[W]e would likewise direct the trial court to carefully reconsider the imposition of the death penalty where two mitigating circumstances weight heavily in the appellant's favor, i.e., her young age and the dominance of her husband . . ." *Id.* at 125.); *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793, *cert. denied*, 400 U.S. 841 (1970)("The defendant has committed a heinous crime. . . . Had he been of mature age the death penalty would have gone undisturbed by this Court. . . . Because of his immaturity [age 15] we are persuaded that he should not die . . ." *Id.* at 360, 464 P.2d at 805.); *Vasil v. State*, 374 So. 2d 465 (Fla. 1979), *cert. denied*, 446 U.S. 967 (1980)(court reduced 15-year-old's death sentence); *Coleman v. State*, 378 So. 2d 640 (Miss. 1979)(court reduced 16-year-old's death sentence); *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959)(court vacated a 15-year-old's death sentence because "age is an important factor in determining the appropriateness of the penalty and should impose upon the sentencing court the duty to be ultra vigilant in its inquiry into the makeup of the convicted murderer." *Id.* at 147, 151 A.2d at 246).

<sup>55</sup> 455 U.S. 104 (1982).

<sup>56</sup> See *supra* notes 23-27 and accompanying text.

<sup>57</sup> 250 Ga. 693, 300 S.E.2d 654 (1983), *cert. denied*, 104 S. Ct. 2669 (1984).

<sup>58</sup> 661 S.W.2d 487 (Mo. 1983)(en banc), *cert. denied*, 104 S. Ct. 2325 (1984).

unusual punishment in violation of the eighth amendment. This proposition is, of course, precisely the issue presented to and avoided by the Supreme Court in *Eddings*, much to the dissatisfaction of Chief Justice Burger writing in dissent.<sup>59</sup> The state courts in *High* and *Battle*, which have interpreted *Eddings* as such, may have been assuming that holding that youthfulness of the offender is a mitigating factor of great weight includes the premise that capital punishment of such youthful offenders is not a *per se* violation of the eighth amendment. However, no reasonably objective reading of *Eddings* can permit this assumption, particularly in light of Justice O'Connor's observation in her concurring opinion: "I, however, do not read the Court's opinion . . . as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16."<sup>60</sup>

Most lower courts have agreed that *Eddings* did not settle the constitutionality issue, but some have gone on to decide that issue themselves. Two illustrative cases are *Prejean v. Blackburn*<sup>61</sup> and *Trimble v. State*.<sup>62</sup> The *Prejean* court interpreted the eighth amendment as focusing on the kind of punishment, and not the characteristics of the offender, as long as the punishment is not the result of bias or prejudice. Thus, the constitutionality claim of Dalton Prejean, age seventeen at the time of his crime, was found to be "without merit".<sup>63</sup>

In *Trimble*, the offender had been seventeen years and eight months old at the time he brutally kidnapped, raped and killed the victim.<sup>64</sup> He appealed his death sentence to the Maryland Supreme Court, claiming, among other issues, that the United States Constitution prohibited capital punishment for crimes committed while under age eighteen.<sup>65</sup> The Maryland court noted that *Eddings* left this question open but that the issue could be resolved from reference to other Supreme Court cases on the constitutionality of capital punishment.<sup>66</sup>

The *Trimble* court's analysis of other lower court cases led it to observe that no other court had found a constitutional bar to capital punishment of juveniles.<sup>67</sup> The *Trimble* court concluded that indicators of society's evolving standards of decency did not reject this punishment for Trimble because it was authorized by the Maryland legislature as one of "29 states [that] permit the execution of juveniles in some circumstances."<sup>68</sup>

<sup>59</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 128 (1982)(Burger, C.J., dissenting).

<sup>60</sup> *Id.* at 119 (O'Connor, J., concurring).

<sup>61</sup> 570 F. Supp. 985 (W.D. La. 1983), *aff'd*, 743 F.2d 1091 (5th Cir. 1984).

<sup>62</sup> 300 Md. 387, 478 A.2d 1143 (1984).

<sup>63</sup> *Prejean*, 570 F. Supp. at 999.

<sup>64</sup> *Trimble*, 300 Md. at 387, 478 A.2d at 1146.

<sup>65</sup> Brief for Appellant at 41-54, *Trimble*, 300 Md. at 387, 478 A.2d at 1143.

<sup>66</sup> *Trimble*, 300 Md. at 417, 478 A.2d at 1158.

<sup>67</sup> *Id.* at 420, 478 A.2d at 1160.

<sup>68</sup> *Id.* at 421, 478 A.2d at 1161.

This strong legislative endorsement outweighed apparent jury reluctance to sentence juveniles to death, the prohibition of this punishment by most countries throughout the world, and the significant body of scholarly thought that rejects capital punishment for juveniles.<sup>69</sup> The *Trimble* court also concluded that the penological goals of retribution and deterrence would be served by execution of juveniles so this sentence was not excessive or disproportionate. It held that the eighth amendment did not prohibit execution of young Mr. Trimble, and adopted a case-by-case approach to future cases of capital punishment for juveniles.<sup>70</sup>

A third approach to interpreting *Eddings* is exemplified by cases such as *Cannaday v. State*.<sup>71</sup> In *Cannaday*, the Mississippi Supreme Court noted that the United States Supreme Court had not found capital punishment of juveniles to be unconstitutional, but avoided attempting its own eighth amendment analysis. The court reversed Attina Cannaday's death sentence on other grounds but expressly excluded the eighth amendment as a basis for that reversal.<sup>72</sup> The *Cannaday* approach is supported by cases such as *Ice v. Commonwealth*<sup>73</sup> and *Tokman v. State*.<sup>74</sup> The *Tokman* opinions are particularly revealing in that they suggest considerable reluctance of the Mississippi Supreme Court to allow capital punishment of juveniles. The majority opinion found no constitutional grounds for prohibiting capital punishment for a crime by a seventeen-year-old but observed: "I find it deeply disturbing that the life of a youth should be taken in punishment for his crime, the justification for it being that it is the law of this state which dictates the result if due process is afforded."<sup>75</sup> The dissenting judge would have gone further, believing that the defendant's youth and background provided the basis for reversing the death sentence and imposing a sentence of life imprisonment.<sup>76</sup>

A final group of state court cases has placed strong emphasis upon the great mitigating weight accorded the defendant's youth, as required by the *Eddings* case, finding this factor to be so compelling that the death sentence must be reversed. *State v. Valencia*<sup>77</sup> is a leading example of this group of cases. The offender was only sixteen when the murder was committed but was sentenced to death by the trial court three successive times

---

<sup>69</sup> See *infra* notes 105-161 and accompanying text for a discussion of all of the factors which should be considered in assessing society's evolving standards of decency.

<sup>70</sup> *Trimble*, 300 Md. at 428, 478 A.2d at 1164.

<sup>71</sup> 455 So. 2d 713 (Miss. 1984).

<sup>72</sup> *Id.* at 725.

<sup>73</sup> 667 S.W.2d 671 (Ky. 1984).

<sup>74</sup> 435 So. 2d 664 (Miss. 1983)(Hawkins, J., dissenting).

<sup>75</sup> *Id.* at 672.

<sup>76</sup> *Id.* at 674 (Hawkins, J., dissenting).

<sup>77</sup> 132 Ariz. 248, 645 P.2d 239 (1982).

despite intervening sentence reversals by the appellate courts.<sup>78</sup> Finally, the Arizona Supreme Court set aside the death penalty and ordered that young Valencia be sentenced to life imprisonment.<sup>79</sup> The *Valencia* court did not rule out capital punishment for all juveniles but concluded that age of the offender was "a substantial and relevant factor which must be given great weight."<sup>80</sup> The clear impression from the case is that only the most extraordinary facts would justify capital punishment of a juvenile.

This concept is further exemplified by the dissent in *Magill v. State*.<sup>81</sup> Florida, the state with the largest death row population in the nation, decided to uphold the death sentence for the seventeen-year-old Magill, the only juvenile on Florida's death row. The rarity and disconcerting effect of this decision was manifested in the dissent:

Appellant's age should have been given greater weight in mitigation. . . . This court has thus far vacated the death sentence of every defendant who has been under the age of eighteen. . . . That is not to suggest that the death penalty should never be imposed on a minor. However, because of society's great concern for its juveniles, great significance should be attached to the fact that a person accused of a capital felony is a minor, especially a minor who is unemancipated.<sup>82</sup>

Another case following in the line of *Valencia* and the *Magill* dissent is *Harvey v. State*.<sup>83</sup> The *Harvey* court also gave very great weight to the offender's youthful age. Based upon that and other mitigating factors, the court found the death sentence disproportionate in his case. This apportionment of such great weight to the youth of the offender has been manifested in many other cases as well.<sup>84</sup>

The lower court decisions split in at least four directions. Some have erroneously assumed that *Eddings* decided the constitutionality issue for capital punishment of juveniles. Others have agreed that *Eddings* left that question undecided and went on to decide the issue themselves, to the detriment of the young offenders before them. A third group has relegated the matter totally to their legislatures, finding no restrictions from *Eddings* or any other source. The last group has focused upon the *Eddings* observation that youthfulness of the offender is to be given great

<sup>78</sup> *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979); *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979); *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982).

<sup>79</sup> *Valencia*, 132 Ariz. at 250, 645 P.2d at 242.

<sup>80</sup> *Id.* at 249, 645 P.2d at 241.

<sup>81</sup> 428 So. 2d 649 (Fla.), *cert. denied*, 104 S. Ct. 198 (1983).

<sup>82</sup> *Id.* at 654 (Boyd, J., dissenting).

<sup>83</sup> 682 P.2d 1384 (1984). Nevada's minimum age for capital punishment is 16 but defendant Harvey was 16 at the time of his robbery and murder. *See* NEV. REV. STAT. § 176.025 (1979).

<sup>84</sup> *See supra* note 54.

weight as a mitigating factor; such courts have gone on to find youth a compelling reason in the case before them to reduce the juvenile's sentence from the death penalty to a lesser penalty.

#### *D. Past Executions and Present Sentences*

Current research has identified about 15,000 legal executions in our nation's history.<sup>85</sup> At least 281 of them have been for crimes committed while under age eighteen.<sup>86</sup> Executions of children have occurred from 1642 through 1986. The youngest of these executed children was age ten at the time of his offense, with at least forty-eight children executed for crimes committed while age fifteen or younger. Over two-thirds of all of the children executed during this 240 year period were black. Only nine of these 281 children were female; all nine were black or American Indian.<sup>87</sup>

Executions of children have been much more common in some states and regions than others. Thirty-six of the fifty states have executed persons for crimes committed while under age eighteen, as have the various federal jurisdictions. Georgia is by far the leader with forty executions; thirty-eight of these executed Georgia children were black. The southern region of the United States has accounted for 64% of all juvenile executions. For the 281 cases, 70% of the offenders were black and 90% of their victims were white.<sup>88</sup>

The data concerning juveniles currently under a sentence of death reflect a somewhat different picture.<sup>89</sup> Only thirty-two of the almost 1,800 persons on death row as of July 1, 1986, committed their crimes while under age eighteen. Race of the offenders is fairly even, with fifteen being white and seventeen being black. Only two are female. Two-thirds of them were age seventeen at the time of their crimes, but five were age sixteen and five were age fifteen.

This brief history of the practice of executing juveniles, along with the current hodgepodge of statutory and case law, describes an American socio-legal phenomenon of considerable concern and importance. However, the American legal environment containing this important phenomenon is confused, highly variable and based upon the most questionable of premises. The imposition of clear constitutional requirements would aid in remedying this situation. The following is an analytic framework for such a constitutional remedy.

---

<sup>85</sup> J. Smykla, *Four Centuries of Executions in America. An Examination of Executions in America: The Espy File* (Mar. 18, 1986) (Paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences, Orlando, Fla.) (available from Professor John Smykla, University of Alabama).

<sup>86</sup> See *supra* note 1.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See *infra* Table 4 and accompanying text.

## II. UNIQUE CONSTITUTIONAL RIGHTS FOR JUVENILES

The Supreme Court has made clear its view of the unique harshness of capital punishment holding that such a severe and irrevocable penalty for crime must be subjected to the most stringent safeguards.<sup>90</sup> One category of such stringent safeguards has been the appropriateness of the death penalty given the individual characteristics of the defendant.<sup>91</sup> Among the individual characteristics singled out for particular constitutional scrutiny in capital punishment cases has been the youthful age of the defendant.<sup>92</sup>

The Supreme Court has been quite willing to "assume juvenile offenders constitutionally may be treated differently from adults."<sup>93</sup> Manifestations of this different treatment are limitations on youths' right to vote, contract, purchase liquor, sue or be sued, dispose of property by will, serve as jurors, enlist in the armed services, drive vehicles, marry, or accept employment.<sup>94</sup> As Justice Frankfurter aptly noted, "[C]hildren have a very special place in life which law should reflect."<sup>95</sup>

The fact that juveniles are less mature and less responsible than adults is a premise often recognized by the Supreme court.<sup>96</sup> Given the great instability of adolescent behavior, they "cannot be judged by the more exacting standards of maturity."<sup>97</sup>

Due to this inherent immaturity and need for tailored governmental response to their misbehavior, the unique and independent juvenile justice system was established, in part, to liberate legally these children from the harsh punishments of the criminal juvenile system. This separate legal system for juveniles has been constitutionally domesticated, nonetheless, it has been permitted to function in a unique manner where justified by the special needs of the children it serves.<sup>98</sup>

The major thrust of the juvenile justice system is to treat and rehabilitate the adolescents it serves.<sup>99</sup> However, some persons who come before the juvenile court, or who are within the age group covered by the juvenile court's jurisdiction are deemed inappropriate candidates for the

<sup>90</sup> See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)(Burger, C.J., plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 592 (1977)(White, J., plurality opinion).

<sup>91</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>92</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 115-17 (1982).

<sup>93</sup> *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

<sup>94</sup> See, e.g., F. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982).

<sup>95</sup> *May v. Anderson*, 345 U.S. 528, 536 (1953)(Frankfurter, J., concurring).

<sup>96</sup> See, e.g., *Eddings*, 455 U.S. at 115-16 (1982).

<sup>97</sup> *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

<sup>98</sup> See *In re Gault*, 387 U.S. 1 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>99</sup> *In re Gault*, 387 U.S. at 15-16 (1967).



treatment and rehabilitative services which the state has to offer.<sup>100</sup> For these persons, chronologically labelled juveniles/children but situationally labelled adults, the adult criminal justice system is imposed.<sup>101</sup> This denial of the benefits and protections of the juvenile justice system may result from particular characteristics of the juvenile or from the lack of a broad range of juvenile services available to the juvenile court in that jurisdiction.<sup>102</sup>

Prosecution in the adult criminal courts subjects the juvenile to the harshest of criminal sanctions, including capital punishment in many jurisdictions.<sup>103</sup> However, it cannot be assumed that these children are now adults for all purposes under law simply because they find themselves in adult criminal court. They still cannot engage in adult activities such as voting, contracting, marrying, or driving commercial vehicles. Ironically, these juveniles are even prohibited from serving on a jury such as the one trying them. Their adult-like acts which have placed them in an adult criminal court are not justification for treating them as adults for purpose of their constitutional and other legal rights. Their youth continues to relegate them to a special category under law that case-specific exclusion or expulsion from juvenile court cannot and does not change.<sup>104</sup>

### III. EXCESSIVE AND DISPROPORTIONATE

The eighth amendment to the United States Constitution forbids the imposition of cruel and unusual punishments. This category of impermissible punishments is not a static concept, but is to be re-examined "in light of contemporary human knowledge."<sup>105</sup> The eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>106</sup> Any criminal sanction "must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment'."<sup>107</sup>

---

<sup>100</sup> See *Kent v. United States*, 366 U.S. 541 (1966).

<sup>101</sup> See *supra* notes 37-41 and accompanying text.

<sup>102</sup> *McKeiver*, 403 U.S. at 544.

<sup>103</sup> "In some jurisdictions, the question of whether a 16-year-old accused of murder will stay in juvenile court, or be tried in the criminal courts for a capital crime, will depend on an individual judge assessing whether the 16-year-old is 'mature' and 'sophisticated.' If he is found to be 'sophisticated,' his reward can be eligibility for the electric chair." F. ZIMRING, *supra* note 94, at xii.

<sup>104</sup> See generally Note, *Eddings v. Oklahoma: A Stay of Execution for Juveniles?*, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 407 (1983).

<sup>105</sup> *Robinson v. California*, 370 U.S. 660, 666 (1962).

<sup>106</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion).

<sup>107</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Stewart, J., plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

Consideration of eighth amendment challenges to specific punishments is to be provided by objective factors to the maximum possible extent: "[A]ttention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted."<sup>108</sup>

To address these issues independently, the following subsections each focus upon single issues. However, these factors should not be weighed solely in isolation but should be combined in a final evaluation of the acceptability of capital punishment of juveniles.

### A. History and Precedent

The formal characterization of the juvenile justice system as a separate system of law manifested a clear rejection of harsh, adult punishment for the unlawful acts of children.<sup>109</sup> The inappropriateness of harsh punishments for youths was not a new concept; it had been an informal premise of Anglo-American criminal justice systems prior to the beginning of the juvenile justice system. While younger offenders may have not had *de jure* benefit of less harsh punishments, research has indicated that they did receive *de facto* benefits, such as shorter sentences, special incarceration facilities, community-based sanctions or outright commutation of criminal sentences.<sup>110</sup>

Capital punishment for such youths has always been rare.<sup>111</sup> Research at England's Old Bailey revealed that over 100 youths had been sentenced to death from 1801-1836 but none had actually been executed.<sup>112</sup> Capital punishment of juveniles was commonly avoided either by bringing only a minor charge or by not prosecuting the youths at all.<sup>113</sup> While some cases do exist, it appears settled that execution of youths was never common in England, at any time.<sup>114</sup> Since 1908, capital punishment has been prohibited for crimes committed while under the age of sixteen in England.<sup>115</sup>

Capital punishment of juveniles has been similarly rare in the United States.<sup>116</sup> Even when sentenced to death by a jury, there has been a very high commutation rate for teenagers on death row.<sup>117</sup> The actual execu-

<sup>108</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (White, J., plurality opinion).

<sup>109</sup> *In re Gault*, 387 U.S. at 15-16.

<sup>110</sup> See, e.g., Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

<sup>111</sup> See generally J. LAURENCE, *THE HISTORY OF CAPITAL PUNISHMENT* 16-18 (1960).

<sup>112</sup> Knell, *Capital Punishment: Its Administration in Relation to Juvenile Offenders in the Nineteenth Century and Its Possible Administration in the Eighteenth*, 5 BRIT. J. CRIMINOLOGY 198, 199 (1965). England's Old Bailey is the primary criminal court in London, England.

<sup>113</sup> *Id.* at 202.

<sup>114</sup> *Id.* at 203.

<sup>115</sup> *Id.* at 202.

<sup>116</sup> See, e.g., *THE DEATH PENALTY IN AMERICA* 52-56 (H. Bedau ed. 1964).

<sup>117</sup> Bedau, *Death Sentences in New Jersey: 1907-1960*, 19 RUTGERS L. REV. 1, 25 (1964).

TABLE 2

**JUVENILE AND TOTAL EXECUTIONS IN THE UNITED STATES  
BY DECADE, 1890s-1980s**

<u>Decade</u>	<u>Total Executions</u>	<u>Juvenile Executions</u>	<u>Percentage</u>
1890s	1,215	20	1.6%
1900s	1,192	23	1.9%
1910s	1,039	24	2.3%
1920s	1,169	27	2.3%
1930s	1,670	41	2.5%
1940s	1,288	53	4.1%
1950s	716	16	2.2%
1960s	191	3	1.6%
1970s	3	0	0%
1980s	61	3	4.9%
Totals:	8,544	210	2.5%

\*Sources of data: W. BOWERS, *LEGAL HOMICIDE* 54 (1984); Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 630 (1983); NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *DEATH ROW, U.S.A.* 4 (May 1, 1986); Streib, *Persons Executed for Crimes Committed While Under Age Eighteen* (July 1986) (unpublished research paper, available from author). Current as of July 24, 1986. An additional 71 juveniles were executed prior to 1890.

tion rate of juveniles for crimes committed while under age eighteen is described in Table 2. Beginning with the 1890's, the total number of juvenile executions each decade ranged from twenty to twenty-seven, comprising about 1.6% to 2.3% of all executions. The number of all executions then rose dramatically during the 1930's to 1,670 for the decade; the number of juvenile executions also rose reaching a total of forty-one, although still only 2.5% of the total.

The peak period for juvenile executions was in the 1940's. The total number reached fifty-three and the percentage of all executions reached 4.1%. The United States was executing an average of 129 persons a year, approximately five of whom had been under age eighteen at the time of

their crimes. Following this decade, the number of total executions per decade dropped precipitiously; juvenile executions dropped even more dramatically. Only sixteen juveniles were executed in the 1950's (2.2% of all executions) and only three juveniles were executed in the 1960's (1.6% of all executions). Juvenile executions ended temporarily in 1964 with the Texas execution of James Echols, age seventeen at the time of his crime of rape.<sup>118</sup>

All executions ended temporarily in 1967 with the execution of Luis Monge in Colorado but resumed with the January 1977 execution of Gary Gilmore in Utah.<sup>119</sup> Of the sixty-one executions from January 1977 through July 1986, only three have been juvenile executions, that of Charles Rumbaugh in Texas on September 11, 1985, James Terry Roach in South Carolina on January 10, 1986, and Jay Kelly Pinkerton in Texas on May 15, 1986.<sup>120</sup>

### *B. Legislative Attitudes*

It is settled in American law that young persons do not have the same legal rights, responsibilities and liabilities as do adults. These special legal categories for youths include rights to vote, contract, purchase liquor, sue or be sued, dispose of property by will, serve as jurors, enlist in the armed services, drive vehicles, marry, accept employment, and many others.<sup>121</sup>

These special legislative attitudes toward youths are reflected most vividly in the establishment of juvenile justice systems within each state. Youths within these juvenile justice systems receive special treatment not available to adults and are not punished for their misdeeds in the same manner as adults for similar acts. Thirty-eight states set age eighteen as the age limit for juvenile court jurisdiction.<sup>122</sup>

Youths who do not obtain or who are cast out of the sanctity of juvenile court may face adult criminal punishment for their misdeeds.<sup>123</sup> For thirty-six states this spectrum of adult criminal punishment includes

---

<sup>118</sup> See generally *Echols v. State*, 370 S.W.2d 892 (Tex. Crim. App. 1963)(affirming conviction and death sentence). Echols was executed on May 7, 1964. W. BOWERS, *LEGAL HOMICIDE* 512 (1984).

<sup>119</sup> W. BOWERS, *supra* note 85, at 419 and 513.

<sup>120</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *DEATH ROW*, U.S.A. 1, 4 (May 1, 1986), lists fifty-six executions since January 1977. Since publication of that report, five more persons have been executed. N.Y. Times, June 25, 1986, at 11, col. 4; *id.*, June 20, 1986, at 11, col. 6; *id.*, June 10, 1986, at 11, col. 4; *id.*, May 21, 1986, at 11, col. 6; and *id.*, May 16, 1986, at 11, col. 1.

<sup>121</sup> See generally F. ZIMRING, *supra* note 94.

<sup>122</sup> See S. DAVIS, *RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM* app. B (2d ed. 1985).

<sup>123</sup> See *supra* notes 37-41 and accompanying text.

capital punishment.<sup>124</sup> However, youths are usually given special protection even under capital punishment statutes.

Some states have maintained capital punishment as part of their criminal sanctions for many, many years, but have never included juveniles. Texas, in which the juvenile court age is seventeen, has excluded such juveniles from capital punishment at least since 1897.<sup>125</sup> Texas is a charter member of the core of death penalty states but, has never seen fit to execute juveniles for their misdeeds.

Other states have more recently excluded juveniles from the coverage of their capital punishment statutes. Currently, fourteen states<sup>126</sup> expressly exclude offenders under age sixteen, seventeen or eighteen from their capital punishment statutes. Several states came to this decision only recently. Ohio had seen two of its death penalty statutes struck down as unconstitutional in the 1970's.<sup>127</sup> The Ohio legislature then enacted a new, fully-developed and presumably acceptable statute in 1981.<sup>128</sup> For the first time in its history, Ohio decided to prohibit capital punishment for crimes committed while under age eighteen.<sup>129</sup>

Nebraska joined this legislative trend against capital punishment of juveniles by amending its statute in 1982. The new Nebraska statute prohibits capital punishment for crimes committed under the age of eighteen.<sup>130</sup> In 1985, Colorado changed its capital punishment statute to remove the possibility of the death penalty for individuals committing crimes while under age eighteen.<sup>131</sup>

Two other recent converts are Oregon and New Jersey. Oregon's 1985 capital punishment statute sets a minimum age of eighteen at time of crime before it can be applied.<sup>132</sup> New Jersey is the most recent example, changing its capital punishment statute in January 1986, to exclude capital punishment for those committing crimes while under age eighteen.<sup>133</sup>

---

<sup>124</sup> See *supra* notes 29-45 and accompanying text.

<sup>125</sup> TEX. PENAL CODE ANN. § 8.07(d)(Vernon Supp. 1982).

<sup>126</sup> California, Colorado, Connecticut, Illinois, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, and Tennessee. See *supra* notes 33-36 and accompanying text.

<sup>127</sup> Ohio's 1954 capital punishment statute was declared unconstitutional in *State v. Leigh*, 31 Ohio St. 2d 97, 285 N.E.2d 333 (1972), and Ohio's 1975 capital punishment statute was declared unconstitutional in *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>128</sup> OHIO REV. CODE ANN. § 2929 (Page 1982)(effective Oct. 1, 1981). This statute has been reviewed and upheld in two Ohio Supreme Court decisions: *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984); *State v. Maurer*, 15 Ohio St. 3d 209, 473 N.E.2d 768 (1984).

<sup>129</sup> See OHIO REV. CODE ANN. § 2929.03 (Page 1982); Streib, *Capital Punishment of Children in Ohio: "They'd Never Send a Boy of Seventeen to the Chair in Ohio, Would They?"*, 18 AKRON L. REV. 51 (1984).

<sup>130</sup> NEB. REV. STAT. § 28-105.01 (1982).

<sup>131</sup> COLO. REV. STAT. § 16-10-103 (1985).

<sup>132</sup> OR. REV. STAT. § 161-620 (1985).

<sup>133</sup> N.J. STAT. ANN. § 2C:11-3f (West 1986)(P.L. 1985, ch. 478, approved Jan. 17, 1986).

Thirteen other states establish a minimum age limit through either their juvenile court waiver statutes or statutes giving concurrent or exclusive jurisdiction to criminal court for capital murders committed by offenders of a certain age or older.<sup>134</sup> While not specifically addressing the issue of minimum age for capital punishment, these measures provide a clear indication of legislative intent to protect youthful offenders from the harshness of criminal sanctions in general.

The capital punishment statutes in an additional six states expressly require the sentencing body to consider, as a mitigating factor, the youth of the offender.<sup>135</sup> While not a complete prohibition of capital punishment of juveniles, the special treatment for youths is once again clear in the legislative attitudes. Another fifteen jurisdictions prohibit all capital punishment.<sup>136</sup>

In sum, over 94% (48/51) of the jurisdictions either prohibit capital punishment for all offenders (including juveniles), prohibit capital punishment for juveniles under a certain minimum age, or statutorily require sentencing judges and/or juries to consider youth as a mitigating factor in capital punishment decisions. Only three states<sup>137</sup> have no legislative provisions for either establishing a minimum age for capital punishment or requiring that youth be considered a mitigating factor in the capital sentencing decisions. Note that only one of these three states—Oklahoma—actually has sentenced any juvenile to death.<sup>138</sup> This overwhelming legislative rejection or disenchantment with capital punishment of juveniles is increasing and cannot be ignored.

### C. Jury Sentencing Patterns

As mandated by recent decisions of the Supreme Court and by most states' capital punishment statutes, juries deliberating on the choice between the death penalty and life imprisonment for a convicted murderer must expressly consider, as a mitigating factor, the youthfulness of the offender. Executions of persons for crimes committed while under age eighteen has always been somewhat rare, about 2.5% of all executions since the 1890's.<sup>139</sup> From this, one might well conclude that juries always have been reluctant to sentence youths to death.

As Table 2 reveals, this reluctance is apparently increasing. Actual executions of juveniles have fallen from 4.1% of total executions (53/1,288) during the 1940's, to 2.4% of the total (6/255) from 1960 through July 1986.

<sup>134</sup> See *supra* notes 37-41 and accompanying text.

<sup>135</sup> See *supra* notes 42-43 and accompanying text.

<sup>136</sup> See *supra* note 32.

<sup>137</sup> Delaware, Oklahoma and South Dakota. See *supra* note 44.

<sup>138</sup> See *infra* Tables 3 and 4 and accompanying text.

<sup>139</sup> See *supra* Table 2 and accompanying text.

The willingness of juries to sentence youths to death has decreased dramatically in the period from December 1983 to July 1986. As Table 3 indicates, thirty-eight of the 1,289 (2.9%) persons on death row as of December 1983 had committed their crimes while under age eighteen.<sup>140</sup> Almost three-fourths of them were age seventeen at the time of their crimes, but nine were age sixteen, and two age fifteen.

During the next two and one-half years the total death row population increased by over 500 persons but the number of juveniles actually decreased. As of July 1986, only thirty-two of the approximately 1,800 (1.8%) persons on death row had committed their crimes while under age eighteen.<sup>141</sup> The drop from thirty-eight to thirty-two juveniles on death row is a 16% decrease in just twenty-seven months although there was a 42% increase (from 1,250 to approximately 1,770) in the adult death row population during that time.

A comparison of the lists of names in Tables 3 and 4 reveals an even more striking fact. Of the thirty-two juveniles on death row in July 1986, twenty-five of them were simply holdovers from December 1983. While thirteen persons on the December 1983 list had been removed from death row (only three by execution), only seven new juveniles had been added (Ward in Arkansas, Livingston in Florida, Cooper in Indiana, Rushing in Louisiana, Wilkins in Missouri, Brown in North Carolina, and Thompson in Oklahoma). These seven new juvenile death sentences comprise only 1% of the approximately 700 death sentences imposed during the two and one-half year period from December 1983 to March 1986.

The only other list of juveniles on death row available for comparison is that relied upon by the Supreme Court in *Eddings v. Oklahoma*.<sup>142</sup> Dated May 1, 1981, this list included seventeen persons on death row for crimes committed while under age eighteen. These seventeen juveniles constituted 2.14% of the total death row population of 794 at that time. Seven of those juveniles were still on death row in December 1983 and three remained on death row in December 1984. This is further evidence of a dramatic decrease in juvenile death sentences in the past few years.

Table 5 indicates that approximately 9.2% of intentional criminal homicides were committed by persons under age eighteen from 1973 through 1983, assuming the arrests for those crimes are indicative of the persons who actually commit them. While only a small percentage of these criminal homicides were capital murders, it seems reasonable to assume that juveniles commit roughly the same portion of capital murders (9.2%) as their criminal homicide total. In striking contrast to

---

<sup>140</sup> See NAACP DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 1 (Dec. 20, 1983).

<sup>141</sup> See Table 4, and NAACP DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 1 (May 1, 1986). Approximately 180 persons have been added to death row in May, June and July of 1986.

<sup>142</sup> See Brief for Petitioner at 19a, app. E, *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

TABLE 3

**PERSONS ON DEATH ROW AS OF DECEMBER 1983  
FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN**

<u>State</u>	<u>Prisoner</u>	<u>Age at Time of Offense</u>	<u>Sex</u>	<u>Race</u>
Alabama	Davis, Timothy	17	male	white
	Jackson, Carnel	16	male	black
	Lynn, Frederick	16	male	black
Florida	Magill, Paul	17	male	white
	Morgan, James	16	male	white
	Peavy, Robert	17	male	black
Georgia	Burger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	High, Jose	16	male	black
	Legare, Andrew	17	male	white
Indiana	Thompson, Jay	17	male	white
Kentucky	Ice, Todd	15	male	white
	Stanford, Kevin	17	male	black
Louisiana	Prejean, Dalton	17	male	black
Maryland	Johnson, Lawrence	17	male	black
	Trimble, James	17	male	white
Mississippi	Cannaday, Attina	16	female	white
	Jones, Larry	17	male	black
	Mhoon, James	16	male	black
	Tokman, George	17	male	white
Missouri	Lashley, Frederick	17	male	black
Nevada	Harvey, Frederick	16	male	unknown
New Jersey	Bey, Marko	17	male	black
N. Carolina	Stokes, Freddie Lee	17	male	black
Oklahoma	Eddings, Monty	16	male	white
Pennsylvania	Aulisio, Joseph	15	male	white
	Hughes, Kevin	16	male	black
S. Carolina	Roach, James Terry	17	male	white
Texas	Barrow, Lee Roy	17	male	white
	Battie, Billy Joe	17	male	unknown
	Burns, Victor Renay	17	male	black
	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny	17	male	white
	Graham, Gary	17	male	black
	Harris, Curtis Paul	17	male	black
	Pinkerton, Jay K.	17	male	white
	Rumbaugh, Charles	17	male	white

\*Sources of data: NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a App. E, Eddings v. Oklahoma, 455 U.S. 104 (1982); various communications with defense attorneys and state officials.



TABLE 4

**PERSONS ON DEATH ROW AS OF JULY 1986  
FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN**

<u>State</u>	<u>Prisoner</u>	<u>Age at Time of Offense</u>	<u>Sex</u>	<u>Race</u>
Alabama	Davis, Timothy	17	male	white
	Jackson, Carnel	16	male	black
Arkansas	Ward, Ronald	15	male	black
Florida	Livingston, Jesse J.	17	male	black
	Magill, Paul	17	male	white
	Morgan, James	16	male	white
Georgia	Burger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	High, Jose	16	male	black
	Legare, Andrew	17	male	white
Indiana	Cooper, Paula	15	female	black
	Thompson, Jay	17	male	white
Kentucky	Stanford, Kevin	17	male	black
Louisiana	Prejean, Dalton	17	male	black
	Rushing, David	17	male	white
Maryland	Trimble, James	17	male	white
Mississippi	Jones, Larry	17	male	black
	Tokman, George	17	male	white
Missouri	Lashley, Frederick	17	male	black
	Wilkins, Heath	16	male	white
New Jersey	Bey, Marko	17	male	black
N. Carolina	Brown, Leon	15	male	black
	Stokes, Freddie Lee	17	male	black
Oklahoma	Thompson, Wayne	15	male	white
Pennsylvania	Aulisio, Joseph	15	male	white
	Hughes, Kevin	16	male	black
Texas	Burns, Victor Renay	17	male	black
	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny	17	male	white
	Graham, Gary	17	male	black
	Harris, Curtis Paul	17	male	black

\*Sources of data: NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (May 1, 1986); sources cited for Table 3, *supra*.

TABLE 5

ARRESTS FOR MURDER AND NON-NEGLIGENT  
MANSLAUGHTER, DISTRIBUTION BY AGE GROUPS, 1973-1983

<u>Year</u>	<u>Total Arrests</u>	<u>Under Age Eighteen</u>		<u>Age Eighteen and Over</u>	
		<u>Number</u>	<u>Percentage</u>	<u>Number</u>	<u>Percentage</u>
1973	14,399	1,497	10.4%	12,902	89.6%
1974	13,818	1,399	10.1%	12,419	89.9%
1975	16,485	1,573	9.5%	14,912	90.5%
1976	14,113	1,302	9.2%	12,811	90.8%
1977	17,163	1,670	9.7%	15,493	90.3%
1978	18,755	1,735	9.3%	17,020	90.7%
1979	18,264	1,707	9.3%	16,557	90.7%
1980	18,745	1,742	9.3%	17,003	90.7%
1981	20,432	1,858	9.1%	18,574	90.9%
1982	18,511	1,579	8.5%	16,932	91.5%
1983	<u>18,064</u>	<u>1,345</u>	7.4%	<u>16,719</u>	92.6%
TOTALS:	188,749	17,407	9.2%	171,342	90.8%

\*Sources of data: FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 179 (1983); *id.* at 176 (1982); *id.* at 171 (1981); *id.* at 200 (1980); *id.* at 196 (1979); *id.* at 194 (1978); *id.* at 180 (1977); *id.* at 181 (1976); *id.* at 188 (1975); *id.* at 186 (1974); *id.* at 128 (1973).

this 9.2% commission rate, juveniles have received a maximum of 2% to 3% of all capital sentences imposed over this time period.

Other factors may be partly responsible for this gross difference in arrests and sentencing. Many of the juveniles arrested for murder and non-negligent homicide are retained within the juvenile court which typically has exclusive original jurisdiction. Of those transferred to or directly charged in adult criminal court, at least some are not charged with capital offenses. These and other factors combine with the reluctance of criminal court juries to impose harsh criminal sanctions, including capital punishment, upon juveniles.

Justice Brennan's view of the message from such jury reluctance is compelling:

When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is deep-seated reluctance to inflict it.<sup>143</sup>

Such a deep-seated reluctance to sentence youths to death is manifested dramatically by jury responses as reflected in their sentencing decisions.

#### *D. Contemporary Standards of Decency*

Criminal punishments which run contrary to popular sentiment can and ought to be banned.<sup>144</sup> Capital punishment for juveniles is such a punishment in that it is in conflict with contemporary theory and practice.<sup>145</sup> An example of the reaction precipitated is the public outcry which resulted from death sentences for a sixteen- and a seventeen-year-old imposed back in the late 1960s.<sup>146</sup>

Leaders of legal, criminological and social policy are coalescing to oppose capital punishment of juveniles. The prestigious American Law Institute excluded capital punishment for crimes committed while under age eighteen from its influential Model Penal Code, concluding that "civilized societies will not tolerate the spectacle of execution of children."<sup>147</sup> This position was also adopted by the National Commission on Reform of Federal Criminal Laws.<sup>148</sup>

In August 1983 the American Bar Association adopted as its formal policy the following resolution:

BE IT RESOLVED, That the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18).<sup>149</sup>

This is the first time in the history of this prestigious organization that it has taken any formal position on any aspect of capital punishment. Upon learning of this ABA position, the Washington Post endorsed the

---

<sup>143</sup> *Furman v. Georgia*, 408 U.S. 238, 300 (1972)(Brennan, J., concurring).

<sup>144</sup> *Id.* at 331-32 (Marshall, J., concurring).

<sup>145</sup> *But see Hill, supra* note 3.

<sup>146</sup> *See TIME*, Feb. 2, 1968, at 64-65.

<sup>147</sup> MODEL PENAL CODE § 210.6 commentary at 133 (Official Draft and Revised Comments 1980).

<sup>148</sup> NATIONAL COMMISSION ON THE REFORM OF CRIMINAL LAW, FINAL REPORT OF THE NEW FEDERAL CODE § 3603 (1971).

<sup>149</sup> *See ABA Opposes Capital Punishment for Persons Under 18*, 69 A.B.A. J. 925 (1983); Recommendation and Report to the ABA House of Delegates by the Section of Criminal Justice, August 1983 (proposing that this resolution be adopted by the American Bar Association).

policy and urged it as a minimum requirement for those jurisdictions which have capital punishment.<sup>150</sup>

All European countries forbid capital punishment for crimes committed by individuals who are under the age of eighteen.<sup>151</sup> More than three-fourths of the nations of the world (seventy-three of the ninety-three reporting countries) have set age eighteen as the minimum age for capital punishment.<sup>152</sup> The United Nations endorsed this position in 1976.<sup>153</sup> Another indication of the present global attitude is the condemnation of the death penalty by Pope John Paul II, the first such position by any Pope in history.<sup>154</sup>

Current public opinion polls suggest strong support for capital punishment in general; the seventy-two percent in favor is the highest total since 1936.<sup>155</sup> However, recent polls of the general public have not asked specifically about capital punishment of juveniles. The last indication from the general public on this narrower issue was a February 1965 Gallup survey which reported that, while forty-five percent supported capital punishment in general, only twenty-three percent favored it for persons under twenty-one years of age.<sup>156</sup> It seems reasonable to assume that an even smaller percentage would have favored capital punishment for persons under eighteen years of age.

A recent poll of lawyers confirms these findings. An American Bar Association poll conducted in September 1984 revealed that sixty-eight percent of lawyers favor capital punishment in general, down slightly from sixty-nine percent in favor in 1983.<sup>157</sup> In striking contrast, fifty-three percent of the lawyers polled in 1984 were opposed to capital punishment for crimes committed while under the age of eighteen.<sup>158</sup> While forty-one percent of male lawyers support capital punishment of juveniles, only twenty-five percent of women lawyers support it. A January 1985 poll of law students revealed that while sixty-one percent of law students favor capital punishment in general, a majority of law

<sup>150</sup> Washington Post, Nov. 8, 1983, § A, at 18, col. 1.

<sup>151</sup> AMNESTY INTERNATIONAL, *THE DEATH PENALTY* (1979); Note, *Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Firm Discipline for the Hopelessly Delinquent?*, 35 U. FLA. L. REV. 344, 345 (1983).

<sup>152</sup> Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 397, 398-404 (1965).

<sup>153</sup> See Hartman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 CIN. L. REV. 655 (1983).

<sup>154</sup> N.Y. Times, Jan. 16, 1983, at 5, col. 2.

<sup>155</sup> *Id.*, Feb. 3, 1985, at 15, col. 1.

<sup>156</sup> Erskine, *The Pools: Capital Punishment*, 34 PUB. OPINION Q. 290 (1970), cited in Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1250 (1974).

<sup>157</sup> Reskin, *The Majority of Lawyers Support Capital Punishment*, 71 A.B.A. J. 44 (Apr. 1985); *Lawyers Strongly Favor the Death Penalty*, 69 A.B.A. J. 1218 (Sept. 1983).

<sup>158</sup> *Id.*

students "oppose public executions and the execution of murderers younger than 18."<sup>159</sup> One could reasonably assume that these opinions of lawyers and law students are not too different from the opinions of the general public.

The issue in essence is not whether capital punishment is officially authorized, but whether it is acceptable to society. Justice Brennan has put the question most succinctly:

The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use.<sup>160</sup>

While still legislatively authorized by most United States jurisdictions, capital punishment for juveniles is fast disappearing throughout the world; such punishment is increasingly condemned by leaders of American criminal jurisprudence. As society matures, it develops new standards of decency to replace earlier, less informed standards. Our society's and the world's contemporary standards of decency reject capital punishment of juveniles and demand that we relegate that practice to our less civilized past.

A decent society places certain absolute limits on the punishments that it inflicts—no matter how terrible the crime or how great the desire for retribution. And one of those limits is that it does not execute people for crimes committed while they were children.<sup>161</sup>

#### IV. MEASUREABLE CONTRIBUTION TO GOALS OF PUNISHMENT

Regardless of any controversy surrounding capital punishment in general, this criminal sanction has been characterized by the Supreme Court in its major opinions on the subject as achieving, to varying degrees, the goals of retribution, general deterrence, and specific deterrence or incapacitation, while obviously rejecting the goals of reformation, rehabilitation and treatment of the offender.<sup>162</sup> Capital punishment

---

<sup>159</sup> Reskin, *A Portrait of America's Law Students*, 71 A.B.A. J. 43, 44 (May 1985).

<sup>160</sup> *Furman*, 408 U.S. at 278-79 (Brennan, J., concurring).

<sup>161</sup> Bruck, *Executing Juveniles for Crime*, N.Y. Times, June 16, 1984, at 17, col. 1.

<sup>162</sup> *Gregg*, 428 U.S. at 183 (Stewart, J., plurality opinion).

cannot be justified, however, unless it makes a measureable contribution to these goals since it is otherwise too harsh in comparison to long-term imprisonment. A careful analysis of capital punishment of juveniles reveals that no such measurable contribution toward these goals is made in the case of these offenders. Capital punishment of juveniles is not reasonably capable of advancing a legitimate state interest and thus cannot be justified under the Constitution.

### A. Retribution

In an earlier time, the United States Supreme Court made clear its dissatisfaction with retribution as a justification for criminal sanctions: "Retribution is no longer the dominant objective of the criminal law."<sup>163</sup> The goal of societal retribution or legal revenge achieved through execution of an offender has since been referred to favorably by both Chief Justice Burger and by Justice Stewart.<sup>164</sup> In contrast, Justice Marshall's view is that the eighth amendment precludes retribution for its own sake.<sup>165</sup> All of these observations were made in cases involving adults sentenced to death.

Retribution as a justification for criminal punishment, including the death penalty, has been a widely-interpreted concept.<sup>166</sup> These interpretations have been limited, according to the Supreme Court, to two having legal import: the institutional revenge model and the just deserts model.<sup>167</sup>

The Supreme Court gave specific attention to the retribution issue in *Enmund v. Florida*.<sup>168</sup> Justice White, writing for the majority, expressed the retribution issue in this manner:

As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability.'

\*\*\*\*

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery,

<sup>163</sup> *Williams v. New York*, 337 U.S. 241, 248 (1949).

<sup>164</sup> *Furman*, 408 U.S. at 394-95 (Burger, C.J., dissenting); *Gregg*, 428 U.S. at 183 (Stewart, J., plurality opinion).

<sup>165</sup> *Furman*, 408 U.S. at 342-45 (Marshall, J., concurring).

<sup>166</sup> For an excellent summary of these various interpretations, see Note, *supra* note 3, at 1506-10.

<sup>167</sup> *Id.*; *Gregg*, 428 U.S. at 183-84.

<sup>168</sup> 458 U.S. 782 (1982).

and his punishment must be tailored to his personal responsibility and moral guilt.<sup>169</sup>

Even if the execution of an adult for revenge or retribution is constitutionally permissible, this justification of capital punishment loses its appeal when the object of that righteous vengeance is a child. Juveniles do not "deserve" harsh punishments in the same way that mature, responsible adults might. Society does not feel the same satisfying, cleansing reaction when a child is executed. Nonresponsible actors, whether children, retarded adults or insane persons, by their very nature, deserve, and usually receive, pity and treatment rather than the revenge of an outraged society anxious to "kill them back."<sup>170</sup> Experts in sentencing youthful offenders have concluded:

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for development of America's youth.<sup>171</sup>

Execution of persons whose crimes were committed while under age eighteen is not necessary to serve the ends of retribution. More than sufficient retribution is achieved by sentencing such persons to long prison terms.

### B. General Deterrence

General deterrence from capital punishment has been the subject of heated debate among criminology scholars.<sup>172</sup> Various members of the Supreme Court have disagreed as to the general deterrent effects of the death penalty. Justices Brennan and Marshall have concluded that no

<sup>169</sup> *Id.* at 800-01 (citations omitted).

<sup>170</sup> See, e.g., H. Frazier, *Juvenile Executions: The Folly of the Inevitable* (Mar. 1985) (Paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences) (available from the author, Professor Harriet C. Frazier, Criminal Justice Administration Department, Central Missouri State University, Warrensburg, Missouri 64093).

<sup>171</sup> TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *supra* note 5, at 7 (cited with approval in *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)). On the issue of youth crime being caused at least in part by such outside influences, see particularly Note, *supra* note 3 at 1492-1503.

<sup>172</sup> See H. BEDAU, *THE DEATH PENALTY IN AMERICA* 93-185 (3d ed. 1982).

verifiable general deterrent effect exists.<sup>173</sup> Justice Stewart acknowledged the lack of clarity in the empirical evidence, but observed:

We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.<sup>174</sup>

Justice Stewart's observations provide an excellent model for analyzing any possible general deterrent effect from capital punishment for juveniles. Given these observations and premises, juveniles' perception of death, and whether juveniles tend to act out of passion and impulse or from cold, calculated decisions appear to be important considerations.

The Supreme Court has observed that young persons are generally unable "to make sound judgments concerning many decisions."<sup>175</sup> They are going through "the period of great instability which the crisis of adolescence produces."<sup>176</sup> Juveniles "generally are less mature and responsible than adults."<sup>177</sup> The *Eddings* majority favorably noted the generally-accepted conclusions about the impulsiveness and irresponsibility of juveniles.<sup>178</sup>

Most social scientists would agree that juveniles live only for today, giving little thought to the future consequences of their actions.<sup>179</sup> Adolescents are in a developmental stage, in defiance of danger and death, and are attracted to games of chance with death from a feeling of omnipotence.<sup>180</sup> Such well-known adolescent behavior was observed long

---

<sup>173</sup> *Furman*, 408 U.S. at 302 (Brennan, J., concurring); *id.* at 353-54 (Marshall, J., concurring).

<sup>174</sup> *Gregg*, 428 U.S. at 185-86 (Stewart, J., plurality opinion).

<sup>175</sup> *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); *accord*, *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

<sup>176</sup> *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

<sup>177</sup> *Eddings*, 455 U.S. at 115-16.

<sup>178</sup> *Id.* at 115.

<sup>179</sup> Kastenbaum, *Time and Death in Adolescence*, in *THE MEANING OF DEATH* 99 (H. Feifel ed. 1959). In their news story, *Children on Death Row*, aired by the American Broadcasting Corporation's World News Tonight on Apr. 15, 1985, correspondent Karen Burns interviewed Wayne Thompson on Oklahoma's death row. Thompson was only 15-years-old at the time of his crime. After Correspondent Burns reminded Thompson that he had been sentenced to death for his crime, she asked Thompson if he had ever thought about the death penalty before committing his crime. Thompson responded that he had not, saying that his only thoughts then were of playing ball or just hanging around with his friends.

<sup>180</sup> Fredlund, *Children and Death from the School Setting Viewpoint*, 47 J. SCHOOL HEALTH 533 (1977); Miller, *Adolescent Suicide: Etiology and Treatment*, 9 ADOLESCENT PSYCHIATRY 327 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981).



ago in juveniles sentenced to death: "On one occasion a boy showed delight at being placed in the condemned cell, apparently because it gave him status in the eyes of his fellow prisoners."<sup>181</sup>

Child development research reveals that ability to engage in mature moral judgments develops significantly during middle and late adolescence, reaching a plateau only after leaving school or reaching early adulthood.<sup>182</sup> Most adolescents have insufficient social experience for making sound value judgments and understanding the long-range consequences of their decisions.<sup>183</sup> United States Supreme Court opinions have recognized this universally understood principle: "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."<sup>184</sup> All of this generally accepted information about typical adolescent behavior leads to the conclusion that juveniles do not commonly engage in any "cold calculus that precedes the decision to act."<sup>185</sup> The premises behind the assumed general deterrence of the death penalty simply do not apply in any reasonable manner to juveniles.

Even if a few juveniles might engage in a cold, premeditated calculus before committing the act, they would know that even though capital punishment might be authorized for juveniles the probability of their ever receiving such punishment for their acts is almost nil. Without some reasonable degree of certainty, any possible general deterrent effect disappears.<sup>186</sup>

### C. *Specific Deterrence and Incapacitation*

Proponents of capital punishment, whether for juveniles or for all offenders, point out that execution of an offender specifically deters and incapacitates that individual offender. An executed prisoner will never commit another murder. This justification for capital punishment of juveniles is not so much incorrect, as simply too much punishment for too little additional result.

<sup>181</sup> Knell, *supra* note 112, at 202 n.8.

<sup>182</sup> See, e.g., Rest, Davidson & Robbins, *Age Trends in Judging Moral Issues: A Review of Cross-Sectional Longitudinal, and Sequential Studies of the Defining Issues Test*, 49 CHILD DEVELOPMENT 263 (1978); M. RITTER, CHANGING YOUTH IN A CHANGING SOCIETY 83 (1980); E. PEEL, THE NATURE OF ADOLESCENT JUDGMENT 131-34 (1971).

<sup>183</sup> Kohlberg, *Development of Moral Character and Moral Ideology*, in M. HOFFMAN & L. HOFFMAN, 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 404-05 (1964).

<sup>184</sup> Bellotti v. Baird, 443 U.S. 622, 635 (1979).

<sup>185</sup> Gregg v. Georgia, 428 U.S. at 186 (Stewart, J., plurality opinion).

<sup>186</sup> See, e.g., H. BEDAU, THE CASE AGAINST THE DEATH PENALTY (1985) (published by and available from the American Civil Liberties Union, 132 W. 43rd Street, New York, New York 10036).

First, long-term imprisonment of young offenders affords society comparable protection against their future crimes. We know that murderers generally are "extremely unlikely to commit other crimes either in prison or upon their release."<sup>187</sup> More specifically, we know that juvenile murderers tend to be model prisoners and exhibit a very low rate of recidivism when released.<sup>188</sup> If the goal of capital punishment is prevention of future murders by these specific juveniles, long-term imprisonment is of comparable specific deterrent impact and negates the need for capital punishment of juveniles.

#### *D. Reformation, Rehabilitation, and Treatment*

The inescapable conclusion is that capital punishment of juveniles makes no measurable contribution to the constitutionally accepted goals of capital punishment. This ultimate punishment does, however, totally reject the one sentencing alternative normally though most appropriate for young offenders—rehabilitation.<sup>189</sup> Execution irreversibly abandons all hope of reforming a teenager and thus is squarely in opposition to the fundamental premises of juvenile justice and comparable socio-legal systems.

[I]ncorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.<sup>190</sup>

Capital punishment of our children inherently rejects humanity's future, which rests with the habilitation and rehabilitation of today's youth.<sup>191</sup> Such a costly rejection should not be made if it makes no measurable contribution to the goals of criminal justice in general, or to capital punishment in particular.

#### V. ARBITRARY, CAPRICIOUS, AND FREAKISH MANNER

To paraphrase Justice Stewart, death sentences for juveniles are cruel and unusual in the same way that a juvenile being struck by lightning

<sup>187</sup> *Furman*, 408 U.S. at 355 (Marshall, J., concurring).

<sup>188</sup> Vitello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 DE PAUL L. REV. 23, 32-34 (1976). See also D. HAMPERIAN, *THE VIOLENT FEW* 52 (1978); T. SELLIN, *THE PENALTY OF DEATH* 102-20 (1982).

<sup>189</sup> See, e.g., *People v. Hiemel*, 49 A.D.2d 769, 372 N.Y.S.2d 730 (1975). The court reduced the murder sentence of a 16-year-old who had used the time in prison to become "a classic example of the rehabilitation heights attainable within our existing penal system by an inmate desirous of taking advantage of the educational facilities available." *Id.* at 770, 372 N.Y.S.2d at 731.

<sup>190</sup> *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).

<sup>191</sup> See generally Note, *supra* note 151.

is cruel and unusual.<sup>192</sup> Those few juveniles selected for capital punishment are only a very small portion of all juveniles who commit criminal homicides, and actual execution of such juveniles is so rare as to be freakish. "[W]here life itself is what hangs in the balance, a fine precision in the process must be insisted upon."<sup>193</sup> Such a fine precision in capital punishment of juveniles has not been and probably can never be achieved.<sup>194</sup>

Table 2 demonstrates just how arbitrary, capricious and freakish juvenile executions have been. In the past century they have accounted for only 2.5% of all executions. Since the 1940's juvenile executions have dropped precipitously; only three have occurred in the past twenty years. While execution of adults in the mid-1980s is no longer front-page news, execution of a juvenile is so rare as to be most newsworthy.<sup>195</sup>

Perhaps the rarity of capital punishment of juveniles stems solely from the rarity of criminal homicides by juveniles. Table 5 reveals that this statement is not a sufficient explanation. Since 1973, when capital punishment entered its modern era, juveniles have accounted for about 9.2% of the arrests for murder and nonnegligent manslaughter. This has been a steadily declining proportion from 10.4% in 1973 to 7.4% in 1983.

The proportion of actual executions of juveniles compared to all executions has never even approached the proportion of arrests. Actual sentencing to death of juveniles is extremely difficult to ascertain; however, it also appears to be a much smaller proportion than actual arrests of juveniles for criminal homicides. As of the end of 1983, approximately 3,000 persons had been sentenced to death under post-*Furman* statutes.<sup>196</sup> The thirty-eight juveniles then on death row (Table 2) remained from approximately seventy-seven juveniles sentenced to death under post-*Furman* statutes, 1972-1983.

If approximately seventy-seven of the 3,000 persons sentenced to death were under age eighteen at the time of their crimes, this constitutes 2.6% of the total death sentences during this period. No actual executions of

---

<sup>192</sup> See *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

<sup>193</sup> *Lockett v. Ohio*, 438 U.S. 586, 620 (1978)(Marshall, J., concurring).

<sup>194</sup> See Greenberg, *Capital Punishment as a System*, 91 YALE L. J. 908 (1982).

<sup>195</sup> The execution of Charles Rumbaugh in Texas on September 11, 1985, prompted in-depth coverage by the news media. See, e.g., N.Y. Times, Sept. 10, 1985, at 8, col. 1 (four-column article on *Execution for Juveniles: New Focus on Old Issue*) id., Sept. 12, 1985, at 11, col. 4 (two-column article on the execution of Rumbaugh); Nat'l Catholic Rep., Nov. 8, 1985, at 11-22 (forum section with six articles on Rumbaugh). Similar news media coverage was devoted to the execution of James Terry Roach in South Carolina on January 10, 1986. See, e.g., NEWSWEEK Jan. 13, 1986, at 74 (two-column article); TIME, Jan. 20, 1986, at 22 (one and one-half page article); N.Y. Times, Jan. 9, 1986, at 22, col. 1 (editorial opposing executions of juveniles).

<sup>196</sup> Streib, *Executions Under the Post Furman Capital Punishment Statutes: The Halting Progression from "Let's do it" to "Hey, There Ain't no Point in Pulling so Tight"*, 15 RUTGERS L.J. 443, 444 n.8 (1984).

juveniles occurred since well before this period. In sum, juveniles accounted for 9.2% of the criminal homicides, 2.6% of the death sentences, and 0% of the actual executions. These figures are for the entire nation. If the inquiry is confined to any one state, the numbers become so miniscule as to become freakish. Moreover, the proportion of juveniles on death row is dropping precipitously despite substantial increases in the adult population on death row.<sup>197</sup>

If the number of juveniles selected for death sentencing and possible execution is considerably less than the number of juveniles who commit capital crimes, how are those sentenced to death selected? The eleven adults selected for actual execution from 1977 through 1983 were chosen from a pool of approximately 3,000 sentenced to death and from the 171,342 adults who committed criminal homicides.<sup>198</sup> A careful analysis of those eleven adult cases has led to the conclusion that they were not unique, and no rational basis could be discerned for their resulting in actual execution.<sup>199</sup> Justice Brennan concluded that these adult executions have not been "selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms."<sup>200</sup>

Extrapolating from these conclusions about adult executions, an even stronger inference can be made in juvenile death sentences and executions. Their rarer and more random pattern of occurrence leaves no alternative to the conclusion that they are most freakishly imposed. No rational selection process can be determined, and one is left to conclude that the basis of selection is arbitrary and capricious.

## VI. AGE EIGHTEEN IS MOST APPROPRIATE

If a constitutional line is to be drawn below which capital punishment will not be permitted, what is the most appropriate age at which such a line should be drawn? When do children become adults in our society for purposes of legal duties and responsibilities? For the vast majority of situations that age is eighteen.

Thirty-eight of the States now set age eighteen as the jurisdictional age limit for their juvenile courts.<sup>201</sup> These states exemplify the common premise that adult responsibility for criminal acts normally should begin at eighteen. Exceptions can and are made with waiver and concurrent jurisdiction provisions but the *de jure* age is eighteen.<sup>202</sup>

<sup>197</sup> See *supra* Tables 3 and 4.

<sup>198</sup> See *supra* Table 5; Streib, *supra* note 196, at 443-44.

<sup>199</sup> Streib, *supra* note 196, at 486.

<sup>200</sup> Pulley v. Harris, 465 U.S. 37, 60 (1984)(Brennan, J., dissenting).

<sup>201</sup> S. DAVIS, *supra* note 122.

<sup>202</sup> See *supra* notes 37-41 and accompanying text.

Ten of the fourteen states which expressly prohibit capital punishment of youthful offenders have set that age as eighteen.<sup>203</sup> Texas has always set the age at seventeen, which is the Texas juvenile court age limit.<sup>204</sup> The minimum age for capital punishment in Nevada is sixteen, which also coincides with their juvenile court age limit.<sup>205</sup> The Model Penal Code minimum age for capital punishment remains at eighteen, after age fourteen was considered and rejected by the American Law Institute.<sup>206</sup> Age eighteen is also the most common age of majority established in American law for noncriminal purposes. For example, the twenty-sixth amendment establishes the right to vote at age eighteen.

Internationally, age eighteen is the age chosen by the three quarters of countries which prohibit capital punishment for juveniles.<sup>207</sup> International treaties, joined by the United States, also use the age eighteen as the cutoff point.<sup>208</sup>

A second-level, less satisfactory choice would be to set the minimum age for capital punishment at the juvenile court age for the particular jurisdiction. This would give constitutional imprimatur for the current practice in such states as Georgia, Nevada, New Hampshire and Texas, all of which use age sixteen or seventeen because that is their juvenile court age. However, that choice allows the present nonuniformity to continue throughout the various jurisdictions. The states presumably would be free to lower their juvenile court's jurisdictional age to an extremely low age without constitutional ramifications on the capital punishment issue. Further, the present range of minimum age from ten to eighteen<sup>209</sup> would continue, leaving vastly different capital punishment liability from state to state.

For these reasons, one minimum age limit for capital punishment should be established. No age other than eighteen is as commonly used for purposes similar to that at issue. Age eighteen is the only reasonable choice for a minimum age for capital punishment.

## VII. SUMMARY AND CONCLUSIONS

Does the eighth amendment to the United States Constitution prohibit capital punishment for crimes committed while under the age of eighteen? The United States Supreme Court has avoided answering directly this question in the past; however, it has provided a general

---

<sup>203</sup> See *supra* note 34.

<sup>204</sup> TEX. PENAL CODE ANN. § 8.07(d)(Vernon Supp. 1985).

<sup>205</sup> NEV. REV. STAT. § 176.025 (1979).

<sup>206</sup> See *supra* note 147 and accompanying text.

<sup>207</sup> Patrick, *supra* note 152, at 398-404.

<sup>208</sup> See *supra* note 153 and accompanying text.

<sup>209</sup> See *supra* Table 1.

analytical framework from which answers may be derived. The foregoing analysis suggests that the most persuasive answer, given that general analytical framework, is that capital punishment of juveniles is cruel and unusual under the eighth amendment. This answer follows from a step-by-step consideration of the supporting arguments for capital punishment as they apply to adolescents. In this application, the force of those supporting arguments either disappears, or in some cases suggests that the threat of capital punishment may become an attraction to death-defying adolescents.

Presently, the thirty-six capital punishment jurisdictions are not acting uniformly. All must give the age of the offender great weight in mitigation of the death penalty, and most expressly prohibit application of their capital punishment statutes to their juveniles below at least some minimum age. While some state courts have tried to resolve the constitutionality question themselves, most simply have left the issue to the state legislatures, which are increasingly considering amending their statutes to join the trend against capital punishment of juveniles.

A uniform, nationwide policy is needed, and such a policy flows most reasonably from the eighth amendment to the United States Constitution. It is beyond argument that American law would not permit capital punishment for a very young child, say the three-year-old toddler who shoots mommy to death with daddy's handgun. It is also settled that American law does permit capital punishment for adults, say the thirty-year-old who shoots his mother to death with his father's handgun. The only issue, then, is the age at which to draw the line between these two polar positions. At present, no universally accepted line exists, save the line at age seven for criminal responsibility of any kind.<sup>210</sup>

The line should be drawn at age eighteen, since that is by far the most common age for similar restrictions and limitations. This line should emanate from the eighth amendment, and should be imposed by the United States Supreme Court.

---

<sup>210</sup> A fundamental premise of Anglo-American criminal law is that persons under age seven are conclusively presumed to be incapable of entertaining criminal intent and thus can not have criminal liability imposed upon them. For the historical roots of this premise, see 4 W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 23-24 (1792); 1 M. HALE, *PLEAS OF THE CROWN* 25-28 (1736). For a recent American acceptance of this premise, see *In re Gault*, 387 U.S. 1, 16 (1967).

